1993

State of Utah v. Sheila J. Shipler : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 930164-CA
v.	:	
SHEILA J. SHIPLER,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

- - - - - - - -

THIS IS AN APPEAL FROM AN ORDER DENYING DEFENDANT'S MOTION TO REDUCE HER CONVICTION TO A MISDEMEANOR UNDER UTAH CODE ANN. § 76-3-402 (1990), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE KENNETH RIGTRUP, PRESIDING.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

OTHER AUTHORITIES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 930164-CA
v.	:	
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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from an order denying defendant's motion to reduce her conviction to a misdemeanor under Utah Code Ann. § 76-3-402 (1990).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1993).

STATEMENT OF ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Has defendant failed to establish that she is entitled to have her third degree felony conviction reduced to a misdemeanor, where she clearly did not meet the requirements of the statute in effect on the date she claims to have qualified for such a reduction?

The trial court did not reach this issue. This Court "may affirm the trial court's decision on any proper grounds, even though the trial court assigned another reason for its ruling." State v. Bryan, 709 P.2d 257, 260 (Utah 1985).

2. Did the trial court correctly conclude that the reduction statute, Utah Code Ann. § 76-3-402(2)(b) (1990), did

not authorize reduction of defendant's third degree felony conviction to a misdemeanor because imposition of the specified felony sentence was not stayed?

The interpretation of a statute is a conclusion of law and is reviewed for correctness. State v. Singh, 819 P.2d 356, 360 (Utah App. 1991), cert. denied, 832 P.2d 476 (1992).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 76-3-402 (1990):

> (1) If the court, having regard to the nature and circumstances of the offense of which the defendant was found guilty and to the history and character of the defendant, concludes that it would be unduly harsh to record the conviction as being for that category of offense established by statute and to sentence the defendant to an alternative normally applicable to that offense, the court may, unless otherwise specifically provided by law, enter a judgment of conviction for the next lower category of offense and impose sentence accordingly.
>
> (2) Whenever a conviction is for a felony, the conviction shall be deemed to be a misdemeanor if:
>
> (a) The judge designates the sentence to be for a misdemeanor and the sentence imposed is within the limits provided by law for a misdemeanor; or
>
> (b) The imposition of the sentence is stayed and the defendant is placed on probation, whether committed to jail as a condition of probation or not, and he is thereafter discharged without violating his probation.
>
> (3) Nothing in this section shall be construed to preclude any person from obtaining or being granted an expungement of his record as provided by law.

Utah Code Ann. § 76-3-402 (Supp. 1993):

(1) If the court, having regard to the nature and circumstances of the offense of which the defendant was found guilty and to the history and character of the defendant, concludes it would be unduly harsh to record the conviction as being for that degree of offense established by statute and to sentence the defendant to an alternative normally applicable to that offense, the court may unless otherwise specifically provided by law enter a judgment of conviction for the next lower degree of offense and impose sentence accordingly.

(2) If a conviction is for a third degree felony the conviction is considered to be for a class A misdemeanor if:

(a) the judge designates the sentence to be for a class A misdemeanor and the sentence imposed is within the limits provided by law for a class A misdemeanor; or

(b)(i) the imposition of the sentence is stayed and the defendant is placed on probation, whether committed to jail as a condition of probation or not;

(ii) the defendant is subsequently discharged without violating his probation; and

(iii) the judge upon motion and notice to the prosecuting attorney, and a hearing if requested by either party or the court, finds it is in the interest of justice that the conviction be considered to be for a class A misdemeanor.

(3) An offense may be reduced only one degree under this section unless the prosecutor specifically agrees in writing or on the court record that the offense may be reduced two degrees. In no case may an offense be reduced under this section by more than two degrees.

(4) This section may not be construed to preclude any person from obtaining or being granted an expungement of his record as provided by law.

Any other relevant text of constitutional provisions, statutes and rules pertinent to the resolution of the issues presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

Defendant was charged with two counts of theft as second degree felonies and one count of theft as a third degree felony, in violation of Utah Code Ann. § 76-6-404 (1990).

Pursuant to a plea agreement, defendant entered a guilty plea to one count of theft as a second degree felony on October 22, 1990 (R. 20-21). The remaining theft counts were dismissed (R. 20-21).

Prior to the imposition of sentence, defendant filed a motion for judgment of conviction for the next lower category of offense under Utah Code Ann. § 76-3-402(1) (1990) (R. 29). The trial court granted defendant's motion and imposed sentence for a third degree felony offense on November 21, 1990, sentencing defendant to zero to five years in the Utah State Prison (R. 30). The trial court then suspended defendant's prison term and placed her on a 36-month term of probation (R. 30-31, attached at Addendum A).

On April 29, 1991 an amendment to section 76-3-402 became effective, which amendment precluded reduction by more than one degree without the prosecutor's consent. Utah Code Ann. § 76-3-402(3) (Supp. 1993).[1]

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[1] For convenience and because the current version of the statute was adopted in 1991, the State references the Court solely to Utah Code Ann. 76-3-402 (Supp. 1993).

Based on information from Adult Probation and Parole (AP&P) that defendant had satisfied all special conditions of her probation, and AP&P's further recommendation that defendant's probation be terminated as successful, the trial court terminated defendant's probation on October 17, 1991, twenty five months early (R. 35). Thereafter, on December 23, 1992, defendant filed a motion to reduce her third degree felony conviction to a misdemeanor (R. 36-37, attached at Addendum B). The State filed an objection and memorandum (R. 47-54, attached at Addendum C).

Following a hearing on the matter (R. 83-93, attached at Addendum D), the trial court concluded section 76-3-402 "[did] not authorize reducing defendant's conviction to a misdemeanor," and denied the motion (R. 56-7, attached at Addendum E).

STATEMENT OF THE FACTS

The facts pertinent to the issues raised on appeal are adequately set forth in the Statement of the Case, supra.

SUMMARY OF THE ARGUMENT

Defendant was not eligible to move the trial court to reduce her third degree felony conviction to a misdemeanor under the reduction statute. The statute sets forth express preconditions for accrual of eligibility for reduction which defendant was not able to fulfill prior to the effective date of the 1991 amendments. Thus, this case is controlled by the amended version of the statute which precludes reduction by more than one degree without the prosecutor's consent. As defendant previously benefitted by a one-degree reduction at the time of

sentencing (from a second to a third degree felony), she is not entitled to any further reduction under the statute without the prosecutor's consent.

Notwithstanding the above, defendant fails to demonstrate that she is entitled to reduction under either version of the statute. Under Utah law, a trial court can either withhold sentence by staying its imposition or by staying execution of a sentence already imposed. The plain language of both versions of the reduction statute requires a stay in the imposition of the sentence, instead of a stay in the execution of the sentence. Here, the trial court first imposed the specified sentence for a third degree felony, and then suspended execution of that sentence and placed defendant on probation. Because the imposition of sentence was not stayed, the trial court correctly concluded that under the plain terms of the statute, defendant was not entitled to have her third degree felony conviction reduced to a misdemeanor.

ARGUMENT

POINT I

DEFENDANT FAILS TO DEMONSTRATE THAT SHE HAS A VESTED RIGHT TO HAVE HER THIRD DEGREE FELONY CONVICTION REDUCED TO A MISDEMEANOR UNDER UTAH CODE ANN. 76-3-402(2)(b) (1990)

Defendant broadly asserts that the trial court erred in refusing to reduce her third degree felony conviction to a class B misdemeanor. Br. of Appellant at 11. In so arguing, defendant asserts that Utah Code Ann. § 76-3-402(2)(b) (1990) controls the

issue as the statute in effect at the time her sentence was imposed. Br. of Appellant at 10 n.2.

Defendant's assertion fails to recognize the statute's express preconditions for accrual of eligibility for reduction. As defendant was not able to fulfill these preconditions prior to the effective date of the 1991 amendments to the statute, she was not eligible to move for a reduction under the 1990 version of section 76-3-402(2)(b); consequently, she has no vested right to reduction thereunder.

This case is controlled by the amended version of the statute which precludes reduction by more than one degree without the consent of the prosecutor, see section 76-3-402(3) (Supp. 1993), which was not given here (R. 47-54), see Addendum C. Defendant previously benefitted from a one degree reduction (from a second to a third degree felony) at the time of sentencing; thus, she is ineligible for another reduction without the prosecutor's consent.

A. The Amended Version of Section 76-3-402 (Supp. 1993) Applies As the Statute in Effect at the Time Defendant's Alleged Right to Reduction Accrued[2]

No person "has a vested right in any rule of law." Berry ex rel. Berry v. Beech Aircraft, 717 P.2d 670, 675 (Utah 1985). Further, impairment of vested rights only occurs when

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[2] The reasoning underlying the State's analysis was originally and more fully set forth in the State's responsive in State v. Ball, Court of Appeals Case No. 920786-CA, filed July 16, 1993. The Ball brief discusses the eligibility requirements for expungement under Utah Code Ann. § 77-18-2 (1990 & Supp. 1992).

rights have accrued to the benefit of a particular person. Madsen v. Borthick, 769 P.2d 245, 253 (Utah 1988). Defendant relies on statutory provisions repealed prior to the date of her motion. Accordingly, in order to prevail she must show that she obtained a vested right to a reduction of her conviction under the 1990 version. Otherwise, the amended version of section 76-3-402 (Supp. 1993), applies as the statute in effect at the time defendant's cause of action accrued, applies. See Department of Social Servs. v. Higgs, 656 P.2d 998, 1000 (Utah 1982); Marshall v. Indus. Comm'n., 704 P.2d 581, 582 (Utah 1985) (setting forth general rule that the substantive law in effect at the time the action is initiated applies).[3]

There are no cases in Utah identifying the point at which eligibility for offense reduction vests. However, the determination of vesting in other contexts demonstrates that rights only accrue when fundamental conditions necessary for maintaining an action are fulfilled. See Gay Hill Field Serv. v. Board of Review, 750 P.2d 606, 609-10 (Utah App. 1988) (where controlling statute requires filing of particular document, cause of action accrues at time condition is fulfilled); Payne v.

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[3] A determination of whether a party's rights have accrued, or vested under a particular statute frequently arises in conjunction with a claim that the statute has been retroactively applied so as to impair the party's rights. Ibid. However, retroactivity is not at issue here. The question before the Court is not whether the amended statute can be applied retroactively to defendant, but whether defendant's alleged right to a reduction under section 76-3-402(2)(b) accrued prior to the effective date of the 1991 amendments or, as the State believes, after it.

Myers, 743 P.2d 186, 189 (Utah 1987) (all conditions for maintenance of suit must be fulfilled before accrual of negligence cause of action); but see Washington Nat'l. Ins. Co. v. Sherwood Assoc., 795 P.2d 665, 669 (Utah App. 1990) (rights and duties of parties to a contract become fixed at the time the contract is entered).

In light of this principle it is frequently stated that a right vests or accrues when the party claiming the right can first maintain an action in court. Payne, 743 P.2d at 189 (negligence action accrues "when the plaintiff[s] could first have maintained [their] action to a successful result," quoting 1 Am. Jur. 2d Actions § 88 (1962)); Silver King Coalition Mines Co. v. Indus. Comm'n., 2 Utah 2d. 1, 268 P.2d 689, 692 (1954) (dependent's cause of action under worker's compensation arises at time of worker's death); Gay Hill, 750 P.2d at 609 (cause of action "accrues at the time it becomes remediable in the courts"); State Tax Comm'n v. Spanish Fork, 99 Utah 177, 181, 100 P.2d 575, 577 (1940) (right to recover taxes arises not at the point at which defendant should have filed its return, but at the date of actual filing).[4]

Defendant has not demonstrated the necessary conditions precedent to establishing a vested right to reduction under the

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[4] Upon closer examination the Gay Hill and Spanish Fork cases are merely special applications of the general rule. In each case the party claiming the right to bring suit was not on notice or otherwise enabled to bring suit until the required reports were filed or completed. Gay Hill, 750 P.2d at 610; Spanish Fork, 100 P.2d at 577.

1990 version of section 76-3-402(2)(b). Both the 1990 and amended versions of the reduction statute require fulfillment of specific conditions before one is eligible for reduction under subsection (2)(b). These conditions include: a stay in the imposition of sentence, placement on probation, as well as the successful completion of that probationary term. Section 76-3-402(2)(b) (1990 & Supp. 1993). Additionally, the amended version clarifies the necessity of a "motion and notice to the prosecuting attorney, and a hearing if requested by either party or the court," as well as a finding from the court that reduction "is in the interest of justice." Section 76-3-402(2)(b)(iii) (Supp. 1993).

Even assuming defendant could demonstrate that the imposition of her sentence was stayed for purposes of the statute,[5] the additional requirement of a violation-free probationary term is not capable of determination until the term expires or is terminated by the court. See Utah Code Ann. § 77-18-1(9) (Supp. 1993) (probation may be terminated at the discretion of the court or upon completion without violation of set term). It follows that defendant was not even eligible to move the court for reduction prior to the completion of her probationary term on October 17, 1991 (R. 35), six months after the effective date of the 1991 amendments to the statute. See *Amendment Notes*, section 76-3-402 (Supp. 1993).

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[5] The State's argument that imposition of defendant's third degree felony sentence was not stayed within the meaning of section 76-3-402(2)(b), is set forth in Point II of this brief.

The conditions for reduction in subsection (2)(b) constitute the bases by which a defendant moving for reduction establishes that the right to bring an action for reduction has accrued. In other types of actions, referenced in the cases cited above, see Br. of Appellee at 8-10, and in defendant's brief, see Br. of Appellant at 10 n.2,[6] the determination of a cause of action is based on "historical" facts bearing on the relevant events. See State v. Abeyta, 852 P.2d 993, 995 (Utah 1993) (finding that the defendant had a vested right in the substantive law governing his right to withdraw his guilty plea, a question whose factual determinants were ascertainable from only the events surrounding his plea).

However, an action for reduction under section 76-3-402(2)(b) does not rely entirely on "historical" facts which may or may not be subsequently determined by the court to support a cause of action. Rather, a motion for reduction is a "contemporary" action in which the movant's cause of action is not even established until he or she can demonstrate a legally sufficient present status, i.e., one whose sentence has been stayed and probationary term successfully completed. Id.. Thus, the right to reduction under subsection (2)(b) of the statute does not even accrue until the existence of this status has been established, for it is patent that a probationer who violates the

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[6] See, e.g., Harris v. Smith, 541 P.2d 343, 344 (Utah 1975) State v. Miller, 464 P.2d 844, 846 (Utah 1970); Belt v. Turner, 483 P.2d 425, 426 (Utah 1971) (setting forth general rule that law in effect at time of sentencing governs).

terms of probation will not be eligible under subsection (2)(b) to have his or her conviction reduced. Id.[7]

In essence, defendant had only a mere expectancy that the 1990 version of section 76-3-402(2)(b) would provide relief if her cause of action accrued before the statute was amended. See Silver King, 268 P.2d at 692 ("It is often said that a right is not 'vested' unless it is something more than such a mere expectation as may be based upon an anticipated continuation of the present laws."); State v. Norton, 675 P.2d 577, 586 (Utah 1983) (ex post facto clause did not preclude application of newly

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[7] A comparison to the analogous requirements for expungement under Utah Code Ann. § 77-18-2(1) (1990 & Supp. 1993) is helpful. See p. 8, n.2, supra. The 1990 version of the reduction statute expressly cross-references to the expungement statute. See *Cross-References*, section 76-3-402 (1990). Expungement, like reduction, requires the fulfillment of certain conditions prior to maintaining an expungement petition.

In particular, the expungement statute requires a clean record, which can only be determined as of the filing of the petition for expungement. Section 77-18-2(1). The clean record requirement is a condition which precedes consideration of the expungement petition. Persons lacking a clean record are "not eligible for expungement of any . . . offenses regardless of type or degree of offense." Section 77-18-2(1)(b). The eligibility determination thus denies expungement to any "person who *at the time* of petition for expungement has two or more convictions . . . [or] a previously expunged [criminal record]." Id. (emphasis added). Accordingly, eligibility for expungement must necessarily "be determined as of the date of the petition." People v. McCloud, 139 Cal. Rptr. 321, 323 (Cal. Ct. App. 1977); State v. Tully, 376 A.2d 194, 195-96 (N.J. Super. App. Div. 1977) (rejecting petitioner's claim that an irreversible right to expungement arose at completion of minimum time requirement). In short, a petitioner has no vested right to expungement prior to the filing of the expungement petition. McCloud, 139 Cal. Rptr. at 323 (fixing eligibility for expungement at the time of petition).

enacted resentencing statute where defendant's "expectancy" in the former statute did not accrue into a perfected defense before the amendment took place), cert. denied, 466 U.S. 942 (1984), overruled on other grounds, State v. Hansen, 734 P.2d 421, 427 (Utah 1986). Because defendant's probationary term was not successfully completed prior to the effective date of the 1991 amendments, defendant's expectation of relief never matured into a vested right in the reduction proceedings provided for under the 1990 version of section 76-3-402(2)(b).

Based on the foregoing, defendant's cause of action is controlled by the amended version of the statute which was in effect at the time her cause of action accrued. Even assuming defendant was otherwise eligible for reduction under subsection (2)(b)(i-iii),[8] she would still not be entitled to reduction under subsection (3) which precludes reduction by more than one degree without the prosecutor's consent. As defendant had previously benefitted from a one degree reduction at the time of sentencing, she was not entitled to another reduction without the prosecutor's consent, which was not give here (R. 47-54), see Addendum C. Therefore, trial court's ruling was correct and should be affirmed.

B. The Court May Affirm on Any Reasonable Ground

Although the prosecutor advanced this argument below (R. 84-91), see Addendum D, the trial court denied defendant's motion for another reason (R. 56-57), see Addendum E, to be

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[8] See n.5, supra.

discussed in Point II of this brief. The Court may affirm the trial court's decision on either ground. See State v. Bryan, 709 P.2d 257, 260 (Utah 1985) (appellate court may affirm lower court's decision on any proper ground, even if lower court assigned another reason for its ruling).

POINT II

THE IMPOSITION OF DEFENDANT'S THIRD DEGREE FELONY SENTENCE WAS NOT STAYED FOR PURPOSES OF EITHER VERSION OF THE REDUCTION STATUTE; THUS, THE TRIAL COURT CORRECTLY DETERMINED DEFENDANT WAS NOT ENTITLED TO HAVE HER CONVICTION REDUCED TO A MISDEMEANOR

Defendant has not demonstrated that the imposition of her third degree felony sentence was stayed; consequently, defendant fails to demonstrate that she is entitled to have her third degree felony conviction reduced to a misdemeanor under either version of Utah Code Ann. § 76-3-402(2)(b) (1990 & Supp. 1993).

A. Imposition of Sentence Below

In denying defendant's motion to reduce her third degree felony conviction to a misdemeanor, the trial court found:

> 1. That on October 22, 1990, the defendant entered a plea of "guilty" to the charge of Theft, a second degree felony;
>
> 2. That on November 19, 1990, the defendant was sentenced as a third-degree felony, pursuant to the provisions of § 76-3-402(1), Utah Code Ann. (1990), to serve, inter alia, the statutory term of zero-to-five years incarceration at the Utah State Prison;

> 3. That on November 19, 1990, the Court suspended the imposition of sentence[9] and placed the defendant on probation; and
>
> 4. That on October 17, 1991, the Court terminated the defendant's probation as successful without violation.

(R. 56-7), see Addendum E. Based on the foregoing findings, the trial court concluded: "[section] 76-3-402(2)(b), Utah Code Ann. (1990), does not authorize reducing defendant's conviction to a misdemeanor because the imposed sentence was executed[10] by the Court" (R. 57), see Addendum E. While the trial court's ruling could have been articulated more precisely, it is a correct interpretation of the statute and should be affirmed.

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[9] Considering the trial court's findings and conclusions as a whole, the trial court's use of the phrase "suspended the *imposition* of sentence" in finding number three is a mis-statement. It is undisputed in the record that the court imposed the sentence specified in Utah Code Ann. § 76-3-203(3) (1990), e.g. a term of zero to five years (R. 30), see Addendum A. See also nn. 12-13, infra. Indeed, in the preceding finding number two, the court expressly recognized its imposition of the specified term of years. Thus, the court suspended the *execution* of sentence, rather than the *imposition* of sentence. This construction of the court's findings is also consistent with the court's ultimate determination that defendant was not entitled to have her third degree felony conviction reduced to a misdemeanor precisely because sentence had been "imposed" (R. 57), see Addendum D.

[10] The court's conclusion that it "executed" defendant's sentence is another apparent mis-statement and is also extraneous to the court's preceding, and more critical, determination that the specified felony sentence had been "imposed" (R. 57), see Addendum E. Construing the court's ruling in conjunction with the record, it is clear the court actually "suspended" the execution of the imposed felony sentence and then placed defendant on probation (R. 30-31), see Addendum A.

B. Distinguishing the Imposition of Sentence From the Execution of Sentence For Purposes of the Reduction Statute

Under either version of the reduction statute, a felony conviction may be considered to be for a misdemeanor if "the *imposition of the sentence is stayed* and the defendant is placed on probation[.]" Section 76-3-402(2)(b) (1990 & Supp. 1993) (emphasis added).[11] In the instant case, the trial court did not stay the imposition of defendant's third degree felony sentence for purposes of section 76-3-402(2)(b)(i) (Supp. 1993). Rather, the trial court imposed an indeterminate term of zero to five years in the Utah State Prison (R. 30), see Addendum A, as specified in Utah Code Ann. § 76-3-203(3) (1990).[12] The court

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[11] The 1991 amendments clarified that only a felony of the third degree was capable of reduction under subsection (2)(b), and that it could only be reduced to a class A misdemeanor.

While subsection designations were also added in subsection 2(b), the operative language requiring a stay in the imposition of sentence, is the same in both the 1990 and amended versions of the statute.

For reasons set forth in Point I, supra, the State's analysis proceeds under the amended version of the statute.

[12] Section 76-3-203(3) provides:

> A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows:
> . . .
>
> (3) In the case of a felony of the third degree, for a term not to exceed five years .
> . . .

then suspended execution of that sentence and placed defendant on probation (R. 30-31), see Addendum A.[13]

The distinction between a stay in the *imposition* of a sentence and a stay in the *execution* of a sentence is real. A trial court can withhold sentence either by staying its imposition or by staying execution of a sentence already imposed. Compare State v. Garnick, 619 P.2d 1383, 1384 (Utah 1980) (execution of defendant's one year jail sentence suspended and defendant placed on probation; thereafter, defendant's probation was revoked and the original jail sentence ordered executed) with State v. Janis, 597 P.2d 873-74 (Utah 1979) (imposition of sentence continued until time of probation revocation; following which revocation "the judge imposed sentence of 0-5 years in the Utah State Prison").

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[13] While it is true that probation can also be a sentence, see Utah Code Ann. § 76-3-201(1)(c) (Supp. 1993), section 76-3-402(2)(b)(i) only makes sense when the term "sentence" as used therein is construed to mean the "sentence" specified for a third degree felony, i.e., a term of years. See section 76-3-203(3). To construe the subsection otherwise is to defeat its purpose. See RDG Assoc./Jorman Corp. v. Indus. Comm'n., 741 P.2d 948, 951 (Utah 1987) ("a proper construction of the statute must further its purposes"); Gleave v. Denver & Rio Grande Western R.R., 749 P.2d 660, 672 (Utah App.) (same), cert. denied, 765 P.2d 1278 (Utah 1988). See also *Sutherland's Stat. Constr.* § 4607 at 127 (5th Ed.) (". . . words or clauses may be . . . restricted to harmonize with other provisions of an act. The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense were they intended to be understood or what understanding they convey when used in the particular act."). The only logical construction of subsection (2)(b)(i) is that the legislature intended to afford those defendants deemed acceptable for a probationary term (in lieu of imposition of sentence), and who also successfully completed that probationary term, an opportunity to have their third degree felony convictions reduced to class A misdemeanors.

The trial court's well recognized sentencing discretion is reflected in the probation statute, which reads in part:

> On a plea of guilty, guilty and mentally ill, no contest, or conviction of any crime or offense, the court may suspend the *imposition or execution of sentence* and place defendant on probation . . . .

Utah Code Ann. § 77-18-1(3)(a) (Supp. 1993) (emphasis added). Another provision provides that "[i]f probation is revoked, the defendant shall be sentenced or the sentence previously imposed shall be executed." Utah Code Ann. § 77-18-1(10)(e)(iii) (Supp. 1993).[14]

Moreover, the provision that preceded Utah's current probation statute provided that:

> Upon a plea of guilty or conviction of any crime or offense, if it appears compatible with the public interest, the court having jurisdiction *may suspend the imposition or the execution of sentence* and may place the

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[14] The legislature has distinguished between the *imposition* and the *execution* of sentence in other provisions of the code, though it has not defined either term. See, e.g., Utah Code Ann. § 76-3-406(1)(1990) ("probation shall not be granted, the execution or imposition of sentence shall not be suspended, . . . for any person who commits a felony of the first degree . . ."); Utah Code Ann. 76-3-203.1(6) (Supp. 1993) ("The court may suspend the imposition or execution of the sentence required under this section . . ."); Utah Code Ann. § 76-5-406.5(1) (Supp. 1993) ("In a case involving rape of a child, aggravated sexual abuse of a child, or sodomy upon a child, the court may impose an indeterminate term for a first degree felony, or execution of sentence may be suspended and probation may be considered . . ."); section 76-5-406.5(5) ("If the court finds a defendant granted probation under this section fails to cooperate or succeed in treatment or violates probation . . . the mandatory minimum sentence previously imposed for the offense shall be immediately executed."); section 76-5-406.5(6) ("A court may not modify the mandatory minimum sentence to an indeterminate term of five years to life and then suspend execution of that sentence and impose probation.").

> defendant on probation for such period of time as the court shall determine.

Utah Code Ann. § 77-35-17 (1953) (emphasis added). In construing this predecessor statute, the Utah Supreme Court said that "[t]he clear meaning of the words of the statute give the court the power to withhold sentence until such time as the court determines whether or not the prisoner is capable of rehabilitation and that this may be done upon his plea of guilty." State v. Fedder, 262 P.2d 753, 755 (Utah 1953). See also Williams v. Harris, 149 P.2d 640, 641-43 (Utah 1944) (imposition of sentence suspended and defendant placed on probation on the condition that he "straighten out" or "come in and be sent to the penitentiary.").

This sentencing discretion facilitates the trial court's "flexibility to deal with exceptional cases and evolving public sentiment." Utah Ct. R. Ann. (1993), *Appendix D: Utah Sentence and Release Guidelines* at p. 1129. Specifically, it affords trial courts the opportunity to relieve less culpable defendants of the stigma associated with the imposition of a felony sentence. See e.g., Williams v. Harris, 149 P.2d at 642-43 (Utah Supreme Court observed that in staying the imposition of sentence the trial court was "endeavoring to save the youths from the stigma of prison. . . . It was dealing with juveniles; boys the court hoped to keep out of the penitentiary; doubtful cases, but worthy of care and consideration in the opinion of the trial judge."). A defendant whom the trial court does not consider to merit the imposition of the specified third degree felony

sentence, see subsection (2)(b)(i), may, upon the successful completion of probation, see subsection (2)(b)(ii), and upon a finding that it is in the interest of justice, see subsection (2)(b)(iii), avoid having the original felony conviction recorded in his/her criminal history. In essence, a defendant qualifying for reduction under subsection (2)(b) benefits from a simultaneous expungement of the prior felony conviction. Thus, the legislature's use of the term *imposition* over the term *execution* in subsection (2)(b) represents more than a semantical choice. It is an express recognition of the trial court's broad sentencing discretion, in the "exceptional case," to spare a less culpable defendant the stigma of a third degree felony sentence.

C. The Plain Language of the Reduction Statute Precludes Reduction Under the Facts of This Case

The plain language of section 76-3-402(2)(b)(i) requires a stay in the imposition of the sentence, instead of a stay in the execution of the sentence. See Cox Rock Prod. v. Walker Pipeline Constr., 754 P.2d 672, 675-76 (Utah App. 1988) ("'We will interpret and apply [a] statute according to its literal wording unless it is unreasonably confused or inoperable.") (citation omitted). See also Mountain States Tel. & Tel. Co. v. Public Serv. Comm'n, 107 Utah 502, 155 P.2d 184, 185 (Utah 1945) (statutory interpretation "must be based on the language used, . . . and the court has no power to rewrite a statute to make it conform to an intention not expressed"). As defendant is not able to demonstrate that imposition of her

sentence was stayed, she is not entitled to relief under the plain terms of the statute.

Defendant at no time argued below that hers was an "exceptional case," meriting a stay in the imposition of the specified third degree felony sentence and immediate placement on probation as required under subsection (2)(b). Rather, at the time of sentencing, defendant moved to have her original second degree felony conviction reduced to a third degree felony under section 76-3-402(1) (1990) (R. 29). The trial court granted that motion and imposed the specified third degree felony sentence (R. 30-31), see Addendum A. The court then suspended execution of that sentence and placed defendant on probation. Id..

Because sentence was imposed on defendant, it is irrelevant that she ultimately, successfully completed her probationary term. See section 76-3-402(2)(b)(ii). Upon the imposition of the specified felony sentence, defendant's opportunity for further reduction was foreclosed.[15] As set forth in Part B, supra, subsection (2)(b)(i) recognizes the well established discretion of the trial court in "exceptional cases" to dispense with the imposition of the specified felony sentence

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[15] Additionally, as set forth in Point I(A), supra, the amended statute clarifies that defendant, as one having previously benefitted by a one degree reduction at the time of sentencing (R. 30), see Addendum A, was precluded from having her conviction further reduced without the consent of the prosecutor, see section 76-3-402(3), which was not given in this case (R. 47-54), see Addendum C. Thus, even if defendant could demonstrate that the imposition of her sentence was stayed under subsection (2)(b)(i), she would still be ineligible for reduction under subsection (3) because the prosecutor declined to consent.

and instead set the terms of a probationary period. As such, subsection (2)(b)(i) represents more than a semantical distinction, it is based on sound policy. Accordingly, the trial court correctly determined defendant was not entitled to further reduction under the plain terms of the statute and this Court should affirm that ruling.

D. State v. Bagshaw Offers No Guidance to the Court

Defendant argues that her case is factually indistinguishable from State v. Bagshaw, 836 P.2d 1384, 1386 (Utah App. 1991), wherein this Court determined Bagshaw was entitled to have her two third degree felony convictions reduced to class B misdemeanors under Utah Code Ann. § 76-3-402(2)(b) (1990). As in this case, the trial court imposed the sentence specified for third degree felonies, an indeterminate term of zero to five years in the Utah State Prison for each of the two counts. Id. at 1384. The court then suspended those sentences and placed Bagshaw on probation. Id.. The similarity between this case and Bagshaw ends here.

At issue in Bagshaw was the trial court's interpretation of "misdemeanor" and whether Bagshaw was entitled to have her convictions reduced to class A misdemeanors as the trial court had done, or further reduced to class B misdemeanors as defendant and the State initially agreed was required under

the plain language of Utah Code Ann. § 76-3-104(2)[16] and the 1990 version of section 76-3-402(2)(b). Bagshaw, 836 P.2d at 1385-86. The State agrees with the Court's disposition of Bagshaw and its interpretation of the applicable statues insofar as section 76-3-104(2) controlled the definition of the term "misdemeanor" in section 76-3-402(2)(b). However, Bagshaw did not address, or even recognize the distinction at issue here, between a stay in the imposition of sentence and a stay in the execution of sentence. Therefore, Bagshaw offers no guidance to the Court in its resolution of this issue.[17]

Defendant's reliance on Bagshaw does not comport with a reasoned interpretation of the reduction statute and should be rejected. The language of the amended statute is identical to that of the previous provision erroneously applied in Bagshaw; thus, it is important that this issue be clarified to prevent further confusion or misapplication of the statute by trial courts.

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[16] Section 76-3-104(2) provides:

> An offense designated a misdemeanor, either in this code or in another law, without specification as to punishment or category, is a class B misdemeanor.

[17] Neither of the parties specifically addressed this issue prior to the issuance of the Bagshaw opinion. For the first time in a petition for rehearing, the State recognized that the distinction between a stay in the imposition of sentence and a stay in the execution of sentence presented a more fundamental question concerning Bagshaw's eligibility for reduction under the statute, which question should have controlled the outcome in that case. The Court denied the State's petition.

CONCLUSION

Based on the foregoing, the trial court's ruling denying defendant's motion to reduce her third degree felony conviction to a misdemeanor should be affirmed.

RESPECTFULLY SUBMITTED this 30th day of August, 1993.

JAN GRAHAM
Attorney General

Marian Decker
MARIAN DECKER
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to RONALD S. FUJINO, SALT LAKE LEGAL DEFENDER ASSOCIATION, attorney for appellant, 424 East 500 South, Suite 300 , Salt Lake City, Utah 84111, this 30th day of August, 1993.

Marian Decker

ADDENDA

ADDENDUM A

JUDGEMENT

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

vs.

SHIPLER, SHEILA J.

DOB: 7/28/64,

Defendant.

JUDGMENT, SENTENCE (COMMITMENT)

Case No. 901901599 FS
Count No. two
Honorable KENNETH RIGTRUP
Clerk Constance George
Reporter Carlton Way
Bailiff Stan Jacobson
Date November 19, 1990

KR ■ The motion of R. Scowcroft to enter a judgment of conviction for the next lower category of offense and impose sentence accordingly is ■ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☐ a jury; ☐ the court; ■ plea of guilty; ☐ plea of no contest; of the offense of Theft, a felony KR of the 2nd degree, ☐ a class ____ misdemeanor, being now present in court and ready for sentence and represented by R. Scowcroft, and the State being represented by T. Vuyk, is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

☐ to a maximum mandatory term of _____ years and which may be for life; 2161287
KR ■ not to exceed five years; (Suspended). 11-26-90-8:35an
☐ of not less than one year nor more than fifteen years;
☐ of not less than five years and which may be for life;
☐ not to exceed _____ years;
KR ■ and ordered to pay a fine in the amount of $1,000.00 $600. May work off thru Comm/Ser at $5.1
KR ■ and ordered to pay restitution in the amount of $------- to Reserved for a Hearing.
KR ■ Deft to pay $250.00 Victim Restitution Assess Fee. & $200.00 Recoupement Fee to LDA
☐ such sentence is to run concurrently with _____
☐ such sentence is to run consecutively with _____
■ upon motion of ■ State, ☐ Defense, ☐ Court, Count(s) 1 & 3 are hereby dismissed.
☐ _____
KR ■ Defendant is granted a stay of the above (■ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of 36 months, pursuant to the attached conditions of probation.
☐ Defendant is remanded into the custody of the Sheriff of Salt Lake County ☐ for delivery to the Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this Judgment and Commitment.
☐ Commitment shall issue _____

DATED this 21st day of November, 1990

Kenneth Rigtrup
DISTRICT COURT JUDGE
KENNETH RIGTRUP

APPROVED AS TO FORM:

_____
Defense Counsel

_____
Deputy County Attorney

00030

901901599 FS

Judgment/State v. SHIPLER, SHEILA J. /CR ____/Honorable KENNETH RIGTRUP

CONDITIONS OF PROBATION

KR ■ Usual and ordinary conditions required by the Dept. of Adult Probation & Parole.
□ Serve _____ in the Salt Lake County Jail commencing _____.
KR ■ Pay a fine in the amount of $1000. ■ at a rate to be determined by the Department of Adult Probation and Parole; or □ at the rate of ($600.00 may be worked off at the rate $5.00 Hr. through Community servic
KR ■ Pay restitution in the amount of $ ---; or □ in an amount to be determined by the Department of Adult Probation and Parole; □ at a rate of ____ by the Court ; or □ at a rate to be determined by the Department of Adult Probation and Parole. (reserved for hearing)
KR ■ Enter, participate in, and complete any Mental Health program, counseling, or treatment as directed by the Department of Adult Probation and Parole, KR including evaluations
□ Enter, participate in, and complete the _____ program at _____.
□ Participate in and complete any □ educational; and/or □ vocational training □ as directed by the Department of Adult Probation and Parole; or □ with _____.
□ Participate in and complete any _____ training □ as directed by the Department of Adult Probation and Parole; or □ with _____.
□ Submit person, residence, and vehicle to search and seizure for the detection of drugs.
□ Submit to drug testing.
□ Not associate with anyone who illegally uses, sells, or otherwise distrubutes narcotics or drugs.
□ Not frequent any place where drugs are used, sold, or otherwise distributed illegally.
□ Not use or possess non-prescribed controlled substances.
□ Refrain from the use of alcoholic beverages.
□ Submit to testing for alcohol use.
□ Take antabuse □ as directed by the Department of Adult Probation and Parole.
□ Obtain and maintain full-time employment.
KR ■ Maintain full-time employment.
□ Obtain and maintain full-time employment or full-time schooling.
□ Maintain full-time employment or obtain and maintain full-time schooling.
□ Defendant is to have no contact nor associate with _____.
□ Defendant's probation may be transferred to _____ under the Interstate Compact as approved by the Department of Adult Probation and Parole.
□ Complete ____ hours of community service restitution as directed by the Department of Adult Probation and Parole.
□ Complete ____ hours of community service restitution in lieu of ____ days in jail.
KR ■ Defendant is to commit no crimes.
□ Defendant is ordered to appear before this Court on _____ for a review of this sentence.
KR ■ Defendant to pay $200.00 Recoupement Fee to LDA.
KR ■ Defendant to pay $250.00 Victim Restitution Assessment Fee.
KR ■ Defendant to not use of possess any credit cards and/or checking accounts etc..
□ _____.
□ _____.
□ _____.

DATED this 21 day of November, 1990.

Kenneth Rigtrup
DISTRICT COURT JUDGE
KENNETH RIGTRUP

00021

ADDENDUM B

ROGER K. SCOWCROFT (#5141)
Attorney for Defendant
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: 532-5444

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, v. SHEILA J. SHIPLER, Defendant.	: : : : : :	MOTION ~~AND ORDER~~ TO REDUCE CONVICTION TO MISDEMEANOR Case No. 901901599FS JUDGE KENNETH RIGTRUP

The defendant, SHEILA J. SHIPLER, alleges:

1. That on September 4, 1990, the defendant was charged by Information in the above-numbered case;

2. That on October 22, 1990, the defendant pleaded guilty to the charge of Theft, a second-degree felony;

3. That on November 19, 1990, the defendant was sentenced by this Court as a third-degree felony and placed on probation; and

4. That on October 17, 1991, the defendant's probation was successfully terminated by this Court without violation.

WHEREFORE, the defendant respectfully moves this Court to reduce the conviction previously entered to a class B misdemeanor pursuant to the provisions of §§76-3-104(2) and 76-3-402(2)(b) Utah Code Ann. (1990).

DATED this 2 day of December, 1992.

ROGER K. SCOWCROFT
Attorney for Defendant

MAILED/DELIVERED a copy of the foregoing to the Salt Lake County Attorney's Office, 231 East 400 South, Salt Lake City, Utah 84111 this 2 day of December, 1992.

ADDENDUM C

DAVID E.YOCOM
Salt Lake County Attorney
ERNIE JONES, Bar No. 1736
Deputy County Attorney
231 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH, Plaintiff,	)	MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO REDUCE DEGREE OF OFFENSE
-vs-	)	
SHEILA J. SHIPLER, Defendant.	)	Case No. 901901599FS Hon. Kenneth Rigtrup

FACTS

1. The defendant was convicted by a plea of guilty on October 22, 1990, of the offense of Theft, a second degree felony.

2. On November 19, 1990, the defendant was sentenced by this Court. At that hearing, the Court granted the defendant's motion to enter conviction for the next lower category of offense and imposed upon the defendant a term in the Utah State Prison not to exceed five years, as provided for the offense of Theft, a third degree felony.

3. The Court then suspended the execution of the imposed sentence and placed the defendant on probation upon various terms and conditions.

4. It appears that the defendant has been discharged from probation without having violated her probation.

ARGUMENT

ISSUE ONE:

THE REQUIREMENTS OF SECTION 76-3-402 (2) HAVE NOT BEEN MET BY THIS DEFENDANT TO QUALIFY HER FOR REDUCTION OF CONVICTION

Section 76-3-402 (2) (b) provides, that the conviction is considered or deemed to be a misdemeanor if "[t]he imposition of sentence is stayed and the defendant is placed on probation . . . and he is thereafter discharged without violating her probation."

It is submitted that the staying of the "imposition of sentence" is a term of art and is not synonymous with the staying of the execution of sentence; that it requires a specific, deliberate act by the judge at the time of sentencing before this portion of the statute can be invoked.

Section 77-18-1 (2) UCA provides that, "[o]n a plea of guilty, . . ., or conviction of any crime or offense, the court may suspend the imposition OR execution of sentence and place the defendant on probation." [emphasis added] It is submitted that the legislature recognizes that there is a distinction between

suspending the imposition and suspending the execution of a sentence.

The case of Williams v. Harris, 149 P.2d 640, (Utah, 1944), dealt with circumstances where the court, after conviction, suspended the imposition of sentence until a later date and placed the defendant in the custody of a Mr. Childs. On that first date the court again suspended the imposition of sentence to another and then another and then another date. Before the last date, the defendant had been convicted of a new criminal offense. After what the appellate court determined was an appropriate hearing, the defendant admitted the violation and the court sentenced the defendant to a prison term. It was only at that last hearing, after the violation, that the Court stated what the term of incarceration for the defendant was to be. In holding that the court had acted properly, the Supreme Court stated,

> "The right to suspend imposition of sentence and the right to place one on probation is a discretionary right. One placed upon probation has a right to be heard as to whether he has violated the conditions upon which suspended sentence was based. [citations omitted] Upon such a hearing, the trial court has discretionary power to continue probation or impose sentence, but to authorize termination of probation there must be some competent evidence of violation of the terms of probation. Violation of the terms and conditions of suspension o[f] probation is usually a ground for revocation and the imposition of sentence." at 642.

In another case, State v. Fedder, 262 P.2d 753 755 (Utah 1953), the Utah Supreme Court quoted the then relevant statute

(77-35-7, UCA 1953), with the following emphasis, "'*Upon a plea of guilty* or conviction of any crime or offense, if it appears compatible with the public interest, *the court* having jurisdiction *may suspend the imposition* or the execution *of sentence* and may place the defendant on probation for such period of time as the court shall determine.' The clear meaning of the words of the statute give the court the power to withhold sentence until such time as the court determines whether or not the prisoner is capable of rehabilitation and that this may be done upon her plea of guilty." [underline is my emphasis, italics are original emphasis]

It is submitted that this case clearly shows that there is a difference between suspending the imposition and execution of a sentence.

The case of State v. Janis, 597 P.2d 873 (Utah, 1979) involved a defendant who, after conviction, was given a sentencing date and two 90-day evaluations which were completed. At the sentencing date held after the last 90-day evaluation, "imposition of sentence was continued to October 18, 1976, and appellant was placed on probation." at 873. Subsequently, the defendant violated the terms of probation and an order to show cause why her probation should not be revoked was set. At that order to show cause, the defendant's probations was revoked and "the judge imposed a sentence of 0-5 years in the Utah State

Prison." at 874. In affirming the authority of the court to so sentence, the Supreme Court cited the then relevant sentencing authority of 77-35-7, UCA and Williams v. Harris, *supra*.

In State v. Garnick, 619 P.2d 1383 (Utah, 1980), the Supreme Court dealt with a case where the facts included that the defendant plead guilty to a class A misdemeanor and, "[o]n November 28, 1978, defendant was sentenced to be confined to the Utah County Jail for a period of one year. Execution of the sentence was suspended and the was placed on probation . . ." at 1384.

It is submitted that the import of all these cases is that there is a difference between the suspension of the imposition and the suspension of the execution of a sentence. It is submitted that when a sentence is imposed when the term of imprisonment or incarceration is set. If no such term of imprisonment or incarceration is stated, then the imposition of a sentence is stayed. If the term of imprisonment is set, then the court can only suspend the execution of the imposed sentence.

It is submitted that for Subsection (2) (b) to apply, the sentencing Court must have sentenced a defendant in a specific way. That specific way must have been that the imposition of sentence was stayed. That is, no term of imprisonment or incarceration must have been established as the punishment for the offense for which the defendant was sentenced. It is

submitted that because this court did not, in the original sentencing of defendant on January 7, 1990, suspend the imposition but rather suspended or stayed the execution of the imposed sentence of not less than one nor more than fifteen years in the Utah State Prison, the requirements of 76-3-402 (2) (b) have not been met and the defendant is not entitled to any reduction of the previously imposed judgment of conviction.

CONCLUSION

It is submitted that defendant's Motion to Reduce Conviction should not be granted because the defendant is not entitled to such reduction, the requirements of Section 76-3-402 (2) (b) having not been met because the sentencing Court did not suspend the imposition of sentence.

DATED this 12th day of February, 1992.

DAVID E. YOCOM
Salt Lake County Attorney

_____
ERNIE JONES
Deputy County Attorney

I hereby certify that a true and correct copy of the foregoing Objection To Defendant's Motion To Reduce Degree of Offense and Memorandum in Opposition to Defendant's Motion to Reduce Degree of Offense was delivered to Roger K. Scowcroft, Attorney for Defendant Sheila J. Shipler, at 424 East 500 South, Suite 300, Salt Lake City, Utah 84111 on the ____ day of February, 1992.

_____

ADDENDUM D

IN THE THIRD JUDICIAL DISTRICT COURT FOR

SALT LAKE COUNTY, STATE OF UTAH

* * *

ORIGINAL

THE STATE OF UTAH, Plaintiff,	
-vs-	Case No. 901901599
SHEILA J. SHIPLER, Defendant.	SENTENCING, 11-19-90

BE IT REMEMBERED that on the 19th day of November, 1990, at 2:30 o'clock p.m., this cause came on for sentencing before the HONORABLE KENNETH RIGTRUP, District Court, without a jury in the Salt Lake County Courthouse, Salt Lake City, Utah.

A P P E A R A N C E S:

For the State: TOM VUYK
Attorney at Law

For the Defendant: ROGER K. SCOWCROFT
Attorney at Law

FILED DISTRICT COURT
Third Judicial District

APR 13 1993

SALT LAKE COUNTY
By _____ Deputy Clerk

CAT by: CARLTON S. WAY, CSR, RPR

APR 19 1993

COURT OF APPEALS

P R O C E E D I N G S

THE COURT: State of Utah versus Sheila J. Shipler; File CR90-1599.

The Court understands that you were originally charged with one count of Theft, a third degree felony; and two counts of Theft, second degree felonies; and pled guilty to one count of Theft, a second degree felony; is that true?

THE DEFENDANT: Yes.

THE COURT: Thereafter, the matter was referred to Adult Probation and Parole Department for a pre-sentence report.

The Court has received such a report.

Have you had an opportunity, Mr. Scowcroft, to review that?

MR. SCOWCROFT: I have, your Honor.

THE COURT: Have you had an adequate opportunity to review that with your client?

MR. SCOWCROFT: Yes.

THE COURT: You may address the issue of sentencing.

MR. SCOWCROFT: Thank you, your Honor. First of all, it's nice to get a report that puts someone in the Excellent category, recommends no incarceration.

On the other hand, it's disturbing to me to see someone without a criminal record burdened with a felony conviction. It's been very difficult on Sheila. She has pleaded guilty to a second degree felony, Theft, for monies taken from her employer in an amount close to $5,000. That's, in essence, in my opinion, a plea as charged. The reason three -- there were three charges filed, as it was based on three months of employment, and I merely say that I -- a second degree felony, of course, is the highest level of theft there is. And for her to plead guilty on that, as I said, in essence, is a plea as charged.

We have submitted a motion pursuant to 76-304-2 for the Court to consider sentencing to a lesser level of offense.

As you know, there's a number of ways that the Court can proceed on that. The Court can do that right now. The Court could allow her to complete probation and entertain our motion to reduce this to a misdemeanor status after probation.

I have know doubt that she will fulfill probation without trouble. The restitution here is sizable. And I will address that issue next.

We'd ask the Court to take those matters into account. Because she has no criminal record, I

feel she is someone who is deserving of that kind of consideration by the Court.

In terms of restitution, your Honor, I talked to Jerry Turner in this case. He's the victim in this case. They've asked for four amounts here, amounts for the checks that were written, of 47, 36, 76 and $539.77 per payroll; and then two amounts for auditing costs of theirs.

In terms of the checks, your Honor, already one check for $500 has been deducted from that amount. The original allegation here was $5,236.76. They've taken one of those checks out that she wrote to herself, a five-hundred dollar check, that -- which was, indeed, authorized. And I brought that to Mr. Turner's attention. So the 47, 36 is the full amount that they've requested here in terms of the checks that Miss Shipler wrote to herself.

She has stated here, your Honor, that -- her story has been that she was party to these acts that she didn't know were criminal because one of the owners of the business authorized her to do it and told her to do it. And that -- she told that to the presentence investigator right here in the report. That's in the report. He, Mr. Mercer, does address that issue.

I'm not here -- I'm not arguing, and neither is she, that she shouldn't pay that amount back in full. But the Court should know that at least one of those checks, they admitted, was authorized; that was a check written to her by herself. $539.75, your Honor, was payroll amounts added to payroll based on confusion on her hourly rate of pay.

If the victim believes that she owes this to them, that's the victim's position, and I suppose the victim's position means most here. She's alleged that these were simply -- that this amount, the 500, 39, 77 was the result of confusion on hourly pay; whether it was six dollars, six, 50 or seven, 25.

They've also asked for restitution in the amount of 1, 97, 50 for bank research, and $1,354 for auditing costs, they say, to investigate these crimes. I'm not certain whether those costs were indeed based on this event or whether those were just normal business expenses. And I'd ask the Court to take that into account and possibly not assessing her those costs.

The -- she is working now. She makes five dollars an hour, brings home about $150 every two weeks. She's married. She has an eight-year-old boy

from her first marriage. And the Court, I guess, has read the letters included in the presentence report from her mother and from her ex-husband.

I'm sure you understand, your Honor, how hard this is on her. And I don't mean to minimize how hard it is on the other people, the victims who lost their money. And that's obviously true. But it is very hard on her. She's put her life on hold in this matter, and it's caused her a lot of pain and suffering to go through this.

My recommendations for sentencing, your Honor -- I'm pleased with the presentence report. It's a good report. I don't think she ought to be incarcerated because I'm confident that she can perform adequately under probation.

I'd ask the Court to consider waiving the fine in this case for community service because her income is limited. And I think she might be able to perform some community service in lieu of that fine.

She will pay the money back in full, and I assume AP&P or any supervising authority would arrange for that. We would ask the Court to consider our motion to reduce this conviction under 76-340-2. We've submitted a motion. I think if a person who has

done something like this admits the crime and makes amends for it, I don't see any interest in burdening her with a conviction like this.

Is there anything you want to say to the Judge, Sheila?

THE DEFENDANT: I said what I could say about it. I feel bad that this whole situation had to happen, that I even have to be here before you. But I will say that I'm willing to do what I can do to make it right. And I would like to get on with my life. My little boy has an ulcer now. And he needs a stable home life like he had. And that's -- that's my goals, is to make him and everyone around me know that I'm definitely not a troublemaker. I have no desire to cause any trouble for anyone.

THE COURT: Mr. Vuyk.

MR. VUYK: We ask that you follow the presentence report. Mr. Jones has not stipulated nor agreed to a reduction, and we would oppose it.

THE COURT: You did indicate -- or at least the presentence report indicates -- that your husband was aware of your involvement.

THE DEFENDANT: Excuse me?

THE COURT: The presentence report at one point indicates that your husband was aware of

your involvement at the time it was taking place?

THE DEFENDANT: I believe Mr. Mercer just -- he spoke with me and asked me how my relationship is now. I just recently got married. And he said -- he says he has stood by me through all this. My understanding from reading that is that he knows the proceedings. He knows what we are going through. He was aware of many things that, you know, went on at the place that I was employed at. And as I said before, it would take a long time to really tell you everything that went on on both sides. However, my husband is aware of everything that is going on as far as, you know, court dates, so forth, so on, everything.

THE COURT: Is there any legal reason why the Court ought not to impose sentence at this time?

MR. SCOWCROFT: I know of none, your Honor.

THE COURT: The motion to reduce one step may be granted. The Court will sentence as a third degree felony. You will be sentenced to serve zero to five years in the Utah State Penitentiary. The Court will suspend that, place you on 36 months of probation on the following terms and conditions: That

you pay a thousand dollar fine, two hundred and fifty dollar Victim Restitution Assessment. You may work off $600 at five dollars per hour through community service, if you desire to do that.

The Court will reserve the issue of restitution. I'm troubled by the auditing charge and would want some firm evidence on that. And the conflicting statements about the rate of pay, I think, I ought to see in a greater scrutiny.

I'll expect you to contact the Court in a reasonable period of time and make arrangements for a hearing on that after you've had a chance to do any discovery you want.

MR. SCOWCROFT: Thank you, your Honor.

THE COURT: You are to abide by the usual conditions of probation. You are to commit no crimes. You are to pay a recoupment fee of $200 to the Legal Defenders Association. You're to maintain full-time employment. You are not to use any credit cards or checking accounts while on probation. And you are to undergo any mental health evaluations and/or treatments as directed from time to time by Adult Probation and Parole Department.

Do you understand those conditions?

THE DEFENDANT: Yes, sir.

MR. SCOWCROFT: Thank you very much.

THE COURT: So if you'll follow through on the restitution?

MR. SCOWCROFT: I will, your Honor.

THE COURT: And advise the clerk that we'll need probably two hours. Make sure that the prosecutor has lead time to get the victims lined up. We'll have a brief hearing on it.

MR. SCOWCROFT: Thank you very much, your Honor.

(Hearing adjourned.)

P R O C E E D I N G S

(Monday, February 22, 1993, 3:00 p.m.)

THE COURT: State of Utah versus Sheila J. Shipler, CR90-1599.

MR. SCOWCROFT: Roger Scowcroft for Miss Shipler, your Honor.

MR. JONES: Ernie Jones for the State.

THE COURT: As I understand it, you've moved to reduce one degree lower; is that accurate?

MR. SCOWCROFT: Your Honor, I moved, pursuant to the 1990 version of 76-3-402 that's controling in this case because that is when the conduct occurred, under Subsection 2b, to reduce it to a misdemeanor. Under the Code, at that time, that would mean it would render it a class B misdemeanor. I don't -- you know, if the Court reduced it to an A, I wouldn't object. But I think that the law at that time would mandate that the court, if the person satisfies the conditions of successful completion without violation, mandates that it be reduced to a misdemeanor, which would be a class B misdemeanor.

I had an opportunity to review the State's memorandum, and I'm prepared to briefly respond to that.

My position on the motion is, once

again, that it is mandatory based upon Miss Shipler's conduct in this case; that is, that she completed probation without violation. She -- incidentally, she has no other criminal history, paid restitution in the amount of about $6,000, completed her probation without a violation. She's a young person with a lot of potential. And, of course, this, I think, means a lot to her ability to make a living, get a good job, other sorts of burdens that a felony conviction creates for people.

So that's our position on the motion, your Honor. I am prepared, I think, to respond to the State's memorandum, if Mr. Jones would like to present it to the Court, or however.

THE COURT: Mr. Jones.

MR. JONES: Well, Judge, I'm not so concerned about the memorandum. As you recall, the Defendant now cites 76-3-402 as the basis to reduce this conviction.

As the Court may recall at the time of sentencing in this case, which was back, I believe, in November, 1990, he filed a similar motion, an oral motion to the Court, to reduce this from a second degree motion (sic) to a third; and the Court granted that motion.

It's our position that Defendant can't come in and use Section 402 for a second time. In other words, what he's doing is filing a motion at the time of sentencing to reduce it one degree, and now he's coming back at the conclusion of probation and trying to invoke the same statute again. I don't read the statute as allowing a defendant two bites at the apple, to allow them to reduce the conviction once at sentencing and again at the conclusion of probation.

In fact, as I read the language in the statute, I think it specifically precludes that. If you look at Subsection 3 of the statute -- under 76-3-402, Subsection 3 says:

"An offense may be reduced only one degree under this section, unless the prosecutor specifically agrees in writing or on the court record that the offense may be reduced."

And I think that's why the language is in there. I don't think the legislature ever intended a defendant to be able to reduce their conviction twice, once at sentencing and again.

As you may recall, frequently at the time of sentencing we have this motion made, and a lot of times the court will take the motion under advisement until we conclude probation and then grant

it if there's no further problems. But in this situation where the Defendant made a motion at the time of sentencing and it was granted, I just don't think you can come in again and cite that same statute and reduce the case for a second time.

So that's the basis for our opposing the motion now to reduce it another degree.

THE COURT: Does she have any other criminal convictions?

MR. JONES: Not that I am of aware of.

MR. SCOWCROFT: Can I respond to --

THE COURT: Just a minute.

MR. SCOWCROFT: Okay.

THE COURT: What harm is done?

MR. JONES: Well, I just don't think that's what the statute's ever designed for, Judge. I just don't think we are --

THE COURT: I understand. That is not the question.

MR. JONES: The harm that it is done is the fact that this woman stole six thousand dollars, she's being prosecuted, she entered a guilty plea and we imposed a sentence.

THE COURT: Has she paid it back?

MR. JONES: As far as I know, she has.

But I don't think it is a question of complying. It is a question of how we are interpreting the statute and what we are doing with the statute. To me, we are just totally distroying the purpose for the statute if we are going to allow defendants two chances to reduce their convictions.

Certainly, the statute allows for them to expunge their record, but they've got to wait -- I think it is -- five years before they come in and do that.

I just don't think the statute was ever designed to give them two different chances to reduce their conviction.

THE COURT: Do you make motions in the interest of justice on occasion?

MR. JONES: Do we make motions in the interest of justice?

THE COURT: Do you on occasion?

MR. JONES: I think it depends on the situation. But, that's what I say --

THE COURT: I mean, that is the question. Do you --

MR. JONES: I guess I don't understand what you are saying.

THE COURT: Do you, on occasions, make

motions in the interest of justice?

MR. JONES: You mean like to dismiss a case?

THE COURT: Sure.

MR. JONES: Yes, in some situations.

THE COURT: Or to reduce, or whatever?

MR. JONES: Yes. But I don't see that as applying to this situation. I mean, we've got a statute that specifically provides for reduction of convictions. And it just seems to me she's already made that motion at the time of sentencing.

MR. SCOWCROFT: Can I respond?

First of all, the 1990 statute that applies in this case does not contain the language cited by Mr. Jones including a two-step reduction. The statute was amended in '91, and that language was inserted then. The version I have given to you.

And, Mr. Jones, the 1990 statute, does not contain that language.

THE COURT: Does it use the language, "Imposition"?

MR. SCOWCROFT: It says, quote, under Subsection 2:

"Whenever a conviction is for a felony, the conviction shall be deemed to be a misdemeanor

if" --

And then Subsection a says:

"Designates the sentence to be a misdemeanor, which was the purpose of the motion -- the written motion we filed at sentencing."

But under Subsection b, a different statute, it says:

"If the imposition of the sentence is stayed and the defendant is placed on probation, whether committed to jail or as a condition of probation or not, and he is thereafter discharged without violating his probation" --

THE COURT: Isn't that the subsection that we are dealing with?

MR. SCOWCROFT: That is. And that is a different section from that utilized by the Court to sentence Miss Shipler to a third degree felony after she pled guilty to a second degree felony.

The Court could have sentenced her to a Class A misdemeanor under the 1990 version of the Code at the time of sentencing, which was the purpose of the motion that we made. That's what we were seeking at that time. The Court could have done it at that time. The Court could have taken it under advisement, and done it now. But there's no statute precluding a

further reduction. And my reading of the statute is, in fact, that it's mandatory. But I think this is a person who, in the interest of justice, deserves it, if anyone does.

THE COURT: You cause me to be more reflective about reducing at the time of sentencing.

MR. JONES: My understanding was that she didn't file this motion for this reduction until October/November of 1991. And this statute that I just cited was in effect.

MR. SCOWCROFT: Well, yes.

MR. JONES: You are going to be able to take the best of both worlds, and say: "We want to use the '90 statute in this situation and the '91 in the next situation."

MR. SCOWCROFT: Well, 76-1-103 of the Code, "Application of Code, Offense prior to effective date" -- got a copy of that, and I've given you a copy, your Honor -- does say that:

"Offenses. Sentencing of offenses is governed by the law in effect at the time of the offense."

And I've got the Code section here. And I'll just give you a copy, Judge, if you want to take a look at that.

My reading is that the 1990 statute applies because the offense occurred in 1990.

THE COURT: I'll deny the motion.

MR. SCOWCROFT: Would the Court issue written findings?

THE COURT: I'm just construing the statute. I executed on the sentence. I didn't suspend the imposition of the sentence.

MR. SCOWCROFT: Well, let me -- the State didn't argue that, Judge. They seemed not to make that argument. That's in the memorandum. If I can briefly address that issue? The State seems to be arguing --

THE COURT: I read their brief.

MR. SCOWCROFT: Okay. Would the Court issue findings? Because we need written findings, I think.

THE COURT: No, I am just applying the statute. I'm making no findings. I guess you can make a finding that I did execute on the sentence. I didn't suspend imposition of the sentence. I concluded that Subsection b applies; and, accordingly, it's not applicable and denied the relief.

MR. SCOWCROFT: All right. I need written findings to pursue this. And I just ask that

the Court have them --

THE COURT: The only finding that I'm aware of is that basically that that's the section under which you move. My order earlier was an execution of the sentence, not a suspension of imposition of sentence.

MR. SCOWCROFT: The problem with that Judge -- and I don't mean to argue with you, and I won't take up your time. But that argument would require that a sentence never even be imposed. If there's a difference between suspending and staying, you'd never ask to reduce a conviction if it were never entered.

THE COURT: As frivolous as it was, I bought it.

MR. SCOWCROFT: All right. Well, I think -- I would request that the State prepare findings. I will need written findings, your Honor.

THE COURT: I guess if you want findings, I am not going -- I told you the extent to which I will find, and that's all. If you want to just briefly state that and submit it to Mr. Jones before it comes over --

MR. SCOWCROFT: Okay. And so the Court's finding, just so I am clear on this, is

that...

THE COURT: I executed sentence. I did not suspend imposition of sentence.

MR. SCOWCROFT: Well, the Court did suspend it. Now, the statute says "stayed" --

THE COURT: I suspended execution on any confinement.

MR. SCOWCROFT: All right.

THE COURT: And placed her on probation on the following terms and conditions.

MR. SCOWCROFT: And so --

THE COURT: The only thing I suspended was the execution on any prison sentence.

MR. SCOWCROFT: Okay. The Court's ruling is that because the imposition of sentence was not stayed, is that correct, that the subsection does not apply?

THE COURT: Right.

MR. SCOWCROFT: I'll prepare findings, then, and submit them to the Court.

THE COURT: I think that's what Mr. Jones said in his brief. That's why. I read it. And that is the basis of my ruling.

MR. SCOWCROFT: Thank you very much.

(Hearing adjourned.)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
County of SALT LAKE)

I, CARLTON S. WAY, CSR, do hereby certify that I am a Certified Shorthand Reporter and a Notary Public in and for the State of Utah;

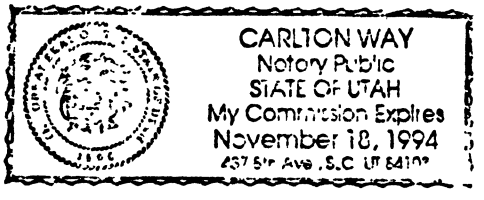
That I took down the proceedings aforesaid at the time and place therein named and thereafter reduced the same to print by means of computer-aided transcription (CAT) under my direction and control;

I further certify that I have no interest in the event of this action.

WITNESS MY HAND AND SEAL this the 13th day of April, 1993.

(Signature)

CARLTON S. WAY, CSR, RPR



ADDENDUM E

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff,	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW
v.	:	
SHEILA SHIPLER, Defendant.	:	Case No. 901901599FS JUDGE KENNETH RIGTRUP

The defendant's Motion to Reduce Conviction to Misdemeanor came before this Court for hearing on February 22, 1993, at the hour of 2:00 p.m. The defendant was represented by her attorney, Roger K. Scowcroft, and plaintiff State of Utah was represented by Deputy Salt Lake County Attorney Ernest W. Jones. Having heard the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

1. That on October 22, 1990, the defendant entered a plea of "guilty" to the charge of Theft, a second-degree felony;

2. That on November 19, 1990, the defendant was sentenced as a third-degree felony, pursuant to the provisions of §76-3-402(1), Utah Code Ann. (1990), to serve, inter alia, the statutory term of zero-to-five years incarceration at the Utah State Prison;

3. That on November 19, 1990, the Court suspended the imposition of sentence and placed the defendant on probation; and

4. That on October 17, 1991, the Court terminated the defendant's probation as successful without violation.

WHEREFORE, having made these Findings of Fact, the Court now enters the following:

CONCLUSIONS OF LAW

1. The defendant's Motion to Reduce Conviction to Misdemeanor is hereby denied on the grounds that §76-3-402(2)(b), Utah Code Ann. (1990), does not authorize reducing defendant's conviction to a misdemeanor because the imposed sentence was executed by the Court.

DATED this 9th day of March, 1993.

BY THE COURT:

Kenneth Rigtrup

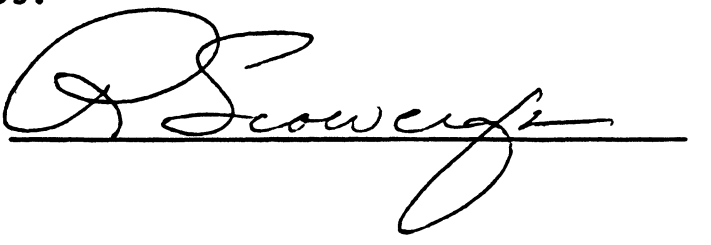
HONORABLE KENNETH RIGTRUP
Third District Court

Approved as to Form:

Ernie Jones

ERNEST W. JONES
Deputy Salt Lake County Attorney

MAILED/DELIVERED a copy of the foregoing to the Salt Lake County Attorney's Office, 231 East 400 South, Salt Lake City, Utah 84111 this 4 day of March, 1993.



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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	ORDER
Plaintiff,	:	
v.	:	
SHEILA SHIPLER,	:	Case No. 901901599FS JUDGE KENNETH RIGTRUP
Defendant.	:	

Based upon the Findings of Fact and Conclusions of Law previously made and entered by this Court, the defendant's Motion to Reduce Conviction to Misdemeanor is HEREBY DENIED.

DATED this 9th day of March, 1993.

BY THE COURT:

Kenneth Rigtrup

HONORABLE KENNETH RIGTRUP
Third District Court

Approved as to Form:

Ernie Jones

ERNEST W. JONES
Deputy Salt Lake County Attorney

MAILED/DELIVERED a copy of the foregoing to the Salt Lake County Attorney's Office, 231 East 400 South, Salt Lake City, Utah 84111 this 4 day of March, 1993.